

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EDDIE L. LUCKETT,

Petitioner

V.

**LOUIS FOLINO, Superintendent,
SCI-Greene; ATTORNEY GENERAL
OF THE STATE OF
PENNSYLVANIA; and
DISTRICT ATTORNEY OF
LACKAWANNA COUNTY,**

Respondents

CIVIL NO. 1:CV-05-1592

(Judge Rambo)
(Magistrate Judge Smyser)

ORDER

Before the court is a report of the magistrate judge to whom this matter was referred in which he recommends that Petitioner's 28 U.S.C. § 2254 petition be dismissed without prejudice based on Petitioner's failure to exhaust state remedies. On December 14, 2001, Petitioner filed in the Court of Common Pleas of Lackawanna County a petition collaterally challenging his conviction under Pennsylvania's Post Conviction Relief Act ("PCRA"). A hearing on that petition was not held until October 2005. That action is still pending. Because there was some action on the PCRA petition during 2005, the magistrate judge found that exhaustion of state remedies should not be excused based on inordinate delay in the state court.

Petitioner has filed *pro se* objections¹ to the report and recommendation and requests that his § 2254 petition be addressed on the merits. Respondents have not responded to Petitioner's objections.

The court agrees with the magistrate judge that exhaustion of state remedies must be achieved before this action can go forward but will not order

¹By order dated October 26, 2005, counsel was appointed for Petitioner; however, the objections were not prepared or filed by counsel.

dismissal of this action. Instead, the court will stay the captioned case and Respondents will be required to file status reports with this court on the progress of the state court action.

IT IS THEREFORE ORDERED THAT:

1) The report and recommendation of Magistrate Judge Smyser is adopted in part and rejected in part.

a) The magistrate judge's recommendation that the case be dismissed without prejudice is rejected.

b) In all other respects the report is adopted.

2) The captioned action is stayed pending further order of this court.

3) Respondents shall file a status report on the PCRA action no later than September 15, 2006 and January 15, 2007.

4) This case is remanded to Magistrate Judge Smyser who shall advise the undersigned of the contents of the status reports.

s/Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: June 23, 2006.